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CONTROVERSIAL PROPOSAL TO BAN ALL FORMS OF TOBACCO ADVERTISING IMPINGES ON THE RIGHT TO 'THE FREEDOM OF COMMERCIAL SPEECH'.

Advertisers will already be aware of the Department of Health recommendation to ban all forms of tobacco advertising from December 1990. The ANZA Council, **in having absolutely no opinion whatsoever on the rights or wrongs of tobacco products**, believes that New Zealand advertisers could be seriously disadvantaged in the future by any government moves now to restrict the freedom of commercial speech.

The ANZA Council viewpoint is as follows:-

1.0 This debate is of major concern to Advertisers. It is a challenge to the whole question of freedom of expression and freedom of advertising in a free society.

2.0 ANZA strongly represents the right of any company, organisation or individual to be able to advertise a legal product or service.

3.0 The free flow of information about economic choices is essential to any democratic system based on consumer choice.

4.0 As a nation, freedom of commercial speech is critical to our freedom of choice and individual autonomy. Freedom in essence is the right to choose and this includes the right to make choices that others may disapprove of.

5.0 Tobacco is a legal product and is legally consumed. On this count alone we endorse that it must be legal for tobacco companies to retain the right to advertise.

6.0 A total ban on the advertising of any product or service would leave the manufacturer concerned with no incentive to develop new and improved products because they would not have the ability to communicate the availability of these products through advertising.

7.0 The banning of tobacco advertising, and therefore the banning of commercial speech, could easily become a weapon in the hands of every self-proclaimed reformer who seeks to advance social or economic change.

CASE FOR THE FREEDOM OF COMMERCIAL SPEECH

The case for 'the freedom of commercial speech' was delivered in a most forceful speech to the recent Congress of the World Federation of Advertisers in Washington DC.

The presentation was made by Professor Burt Neuborne of the New York University School of Law. Neuborne is the author of an extended essay "Free Speech, Free Markets, Free choice". He has a background of more than 25 years as a civil liberties lawyer in the United States.

The following is a summary of the main points Neuborne made:-

Commercial free speech is under attack due to the common notion that speech is divisible into first and second class speech, Neuborne says.

First class speech in Western nations consists of speech on religion, politics, science and aesthetics. In all democratic societies these forms of speech receive some institutional protection.

However, commercial speech is somehow seen as separate and second class. Neuborne sees the need to look at freedom of expression as a whole and **attempts to drive a wedge between commercial speech and other**

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To the extent that governments regulate production and distribution methods, the assumption seems to exist that governments can equally regulate commercial speech as part of the process of the production chain.

Commercial speech is seen as being fundamentally different, as a form of speech which cannot enjoy the presumption in favour of free speech.

Political discrimination is one aspect.

Commercial speech is associated with the capitalist society. Intellectuals who do not share this world-view argue against freedom of commercial speech. Neuborne believes this is a form of disguised political censorship. The same intellectuals will vigorously defend political free speech and there is a need for their assumptions to be challenged by the commercial speech community.

Neuborne develops a four-part critique of the arguments for and against commercial freedom of speech.

1. THE VALUE CRITIQUE

The argument is made that there is something fundamentally different between a speaker in the commercial speech area and a speaker in the so-called first class areas of religion, politics, science and aesthetics.

Speakers in the first class area are attempting to express some deeply felt values, as protecting the capacity of the human spirit for higher spiritual things.

They argue that corporations have no souls, that they are not expressing their yearnings of the human spirit. All they are trying to do is make a profit.

This is only looking at the argument from the speakers' viewpoint, Neuborne says. The speech process does not stop with the speaker. In modern society there are usually three parts to the process. The speaker, the conduit which disseminates the speaker's message and, finally, the hearer, the ultimate recipient.

The hearer has an interest in receiving information in order to make decisions about the hearer's own life; decisions which reflect the same values and concerns underlying traditional free speech.

The hearer should be in a position to make decisions and choices free from the guiding hand of the state. Control by the state is an attempt to manipulate the hearer.

Commercial free speech is principally a hearer-related phenomenon. Neuborne says, a mechanism which permits the hearer to exercise choice and which permits systems based on choice to function in a morally and economically acceptable way.

2. THE PSYCHOLOGICAL CRITIQUE.

Commercial speech is seen as somehow different because it is more manipulative, a form of mass hypnosis. This argument is easily defeated on empirical and value grounds, Neuborne says.

In empirical terms, there is nothing more manipulative than political advertising but no one suggests regulating that because it is too manipulative or too effective.

The argument also undervalues the capacity of an individual to make judgements on what the individual wished to do. We would never think of censoring political speech aimed at individuals making decisions about the future of a nation.

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We cannot say in one breath that the population is a paragon of democratic virtue, capable of making decisions on the future of society but the next day reduced to a group of gullible bumpkins who have to be protected against advertising because they are too stupid to know what's good for them, Neuborne says.

You cannot have a true political democracy if you allow the view that people are too stupid to make choices about what to believe or who to follow or will be influenced by a particular form of commercial speech.

3. THE ECONOMIC CRITIQUE.

The argument that advertising is economically inefficient has been demolished, Neuborne says. The purpose of modern advertising is to permit efficient choice mechanisms that could not be made in its absence. The efficiency of the market depends on the free flow of commercial information.

4. MATERIALIST CRITIQUE.

This argument says commercial speech should be controlled because it manipulates or has little value or that the hearer does not want to hear it.

The real reason, Neuborne says, is that it is seen as being too materialistic and over time it will erode society's higher values of caring and non-material concerns. An uncensored barrage of commercial speech will reduce us to a society that cares only for pleasure and the satisfaction of material wants.

This argument is easiest to defeat in a legal sense. It is simply a naked preference by the proponents of the argument and a clear restriction which can be dealt with in a legal manner.

However, commercial speech is essentially materialistic and the commercial community needs to be aware of its impact and to have concern for the general spiritual values of society. **It must regulate itself.**

With freedom of commercial speech comes the responsibility to use it wisely. Neuborne proposes three further arguements in favour of commercial free speech.

The first is the essential relationship between commercial free speech and what he terms democracy where consumers vote with their dollars. Such a system cannot work without a free flow of information.

If the state controls that flow then political and economic democracy is no longer viable. If the state controls what consumers see and hear then the state controls what consumers do. There is a twin commitment to economic and political democracy, Neuborne says.

Secondly, commercial speech is an important information source. Advertising is an expression of the collective wants and needs of society and, in addition, it funds virtually every other form of speech. All the traditional forms of free speech, political, religious, scientific and aesthetic, rely largely on advertising-supported media for free distribution.

Lastly there is the connection between commercial free speech and individual autonomy. There is the tendency on the part of reformers, Neuborne says, to want to make things a little better. They argue that a little bit of censorship just this once on just this one thing will make things better.

It will not be the last time they ask, Neuborne says.

Individual autonomy is the right to make mistakes, to do things that others may think are silly or wrong or foolish. Erode individual autonomy just once and you never put it back together again.

Commercial freedom of speech is worth protecting, Neuborne says.

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Need for an independent and impartial hearing

The ANZA Council is now trying to convince Government that the issue of 'freedom of commercial speech' has to be debated quite separately from the proposed tobacco advertising ban.

At the moment it appears that the Department of Health is the final arbiter, acting as prosecutor, judge and jury, and the ANZA Council considers this to be totally undemocratic.

The ANZA Council has proposed to Government that the only fair and democratic procedure is for a totally independent commission or a parliamentary select committee to adjudicate on the many matters of principle that the advertising industry wishes to raise in defending the whole question of freedom of expression and freedom of advertising in a free society.

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